



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Richard Doyle,
City Attorney

SUBJECT: Status Report on Electronic
Cigarette Regulation

DATE: May 7, 2014

BACKGROUND

The Rules Committee on April 16, 2014, directed the City Manager's Office and the City Attorney's Office to work together on the potential regulation of electronic cigarettes ("e-cigarettes") and return to Rules with a status report.

ANALYSIS

Local Regulation

City staff from the City Manager's Office, Public Works Department, Code Enforcement, and City Attorney's Office is evaluating options for the regulation of e-cigarettes. Public Works staff is currently researching any applicable existing policies related to smoking within City-owned buildings and facilities so that a determination can be made about how best to regulate e-cigarettes within these buildings and facilities.

City staff has contacted County Public Health and has been advised that the County's e-cigarette regulations will be discussed at the Health and Hospital Committee on May 16th. The County's proposed ordinances are not yet final at this time. County staff has advised that the ordinances are anticipated to go before the Board of Supervisors on June 10th.

The City Manager's Office and the City Attorney's Office believe that building off of the work of the County, and in particular the work done by County Public Health to make the appropriate health and welfare findings for the City's potential ordinance, is the prudent path to take forward in regulating e-cigarettes in the City. Therefore, City staff will continue to track the progress of the regulation of e-cigarettes at the County and will report back on potential City regulation after the County has completed its regulations.

State Regulation

The State of California currently prohibits the sale of e-cigarettes to minors. The State does not regulate the use of e-cigarettes.

Federal Regulation.

On April 24, 2014, the Food and Drug Administration (FDA) proposed rules for e-cigarettes. The FDA will accept comments on these rules until July 9th. Even after these proposed rules are finalized, the FDA may later issue further restrictions.

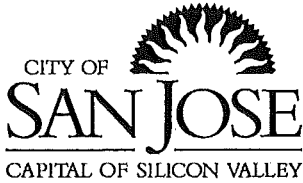
Consistent with currently regulated tobacco products, makers of e-cigarettes under the proposed rule would, among other requirements, have to register with the FDA and report product and ingredient listings; only market new tobacco products after FDA review; only make direct and implied claims of reduced risk if the FDA confirms that scientific evidence supports the claim and that marketing the product will benefit public health as a whole; and not distribute free samples. In addition, under the proposed rules, sales to minors would be prohibited and makers would have to include health warnings, specifically including that nicotine is addictive.

RICHARD DOYLE
City Attorney

By: _____



TERRA CHAFFEE
Deputy City Attorney



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Richard Doyle,
City Attorney

SUBJECT: Electronic Cigarette
Regulation

DATE: April 10, 2014

RECOMMENDATION

Direct staff to examine the public health, safety, and welfare issues surrounding the regulation of electronic cigarettes.

BACKGROUND

The Rules Committee on April 2, 2014, directed the City Attorney's Office to review the local, state and federal regulation of electronic cigarettes ("e-cigarettes").

ANALYSIS

Federal Regulation.

In 2008, the FDA moved to establish authority over e-cigarettes as drugs or drug delivery devices by blocking the import of new e-cigarette shipments into the United States. The FDA claimed it had the authority to regulate e-cigarettes as "drugs," "devices," or drug/device combinations under the Food, Drug and Cosmetic Act. In 2009, the e-cigarette manufacturer Sottera sued the FDA. Sottera argued the agency didn't have authority over e-cigarettes as drugs or drug delivery devices, and therefore could not stop shipments. In January 2010, the district court agreed with Sottera and held that the FDA may not regulate e-cigarettes as a drug or drug delivery device. Instead, because the nicotine contained in the e-cigarette cartridges is derived from tobacco, the court held that the FDA may regulate them as a tobacco product. The FDA appealed to the Court of Appeals. The Court of Appeals upheld the lower court's decision on December 7, 2010. It held that because the e-cigarettes at issue are not marketed as tobacco cessation aids (such as nicotine gum or patches), the FDA does not have authority over e-cigarettes as a drug or drug delivery device.

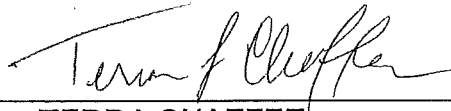
The FDA decided not to appeal the Court of Appeals' decision to the U.S. Supreme Court, instead announcing in April 2011 that it plans to issue regulations on e-cigarettes as a tobacco product under the Tobacco Control Act. Thus far, these proposed regulations have not been issued. Only e-cigarettes that are marketed as tobacco cessation aids are currently regulated by the FDA.

State and Local Regulation

The Tobacco Control Act expressly allows state and local governments to regulate the sale or use of tobacco products, and authorizes them to enact measures that are more restrictive than federal law. The State of California prohibited the sale of e-cigarettes to minors in September 2010, but does not currently restrict the use of e-cigarettes in any way.

The San José Municipal Code currently prohibits smoking in various locations, but it does not regulate the use of e-cigarettes. The Municipal Code could be amended to prohibit the use of e-cigarettes in all of the locations where the City currently regulates smoking. However, the City Attorney's Office recommends that any proposed ordinance regulating the use of e-cigarettes include comprehensive findings regarding the public health, safety, and welfare purpose of the ordinance. In order to make findings of this nature, the appropriate City staff would need to thoroughly examine and bring forward all relevant public health, safety, and welfare information related to e-cigarettes and the proposed regulation of them. In the event of a legal challenge, these findings would aid the City in its defense of the regulation of e-cigarettes.

RICHARD DOYLE
City Attorney

By: 
TERRA CHAFFEE
Deputy City Attorney



RULES AGENDA: 4-16-2014

ITEM: G.7

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Councilmember Ash Kalra

SUBJECT: ELECTRONIC CIGARETTE
REGULATION

DATE: April 15, 2014

Approved

Date

4/15/2014

RECOMMENDATION

Direct staff to draft an amendment to city ordinance Title 9 Section 44 that would regulate electronic smoking products and electronic nicotine delivery devices in the same way as traditional tobacco products within the City of San José.

BACKGROUND

As discussed in the memorandum by Council Member Herrera dated April 2, 2014, it is time for San José to join the many dozens of cities and school districts throughout the nation who have taken quick action to regulate the use of products commonly referred to as e-cigarettes. San José has been a leader in protecting the public health of its residents, including strengthening our second-hand smoke policy a couple of years ago to ban smoking in outdoor dining, service lines, and common outdoor areas of multiple-family housing. Now is not the time to relent in protecting our residents from the dangers of both direct and second hand smoke, nicotine and chemical ingestion.

Some would argue that due to the novelty of the products and given the fact there are limited national regulations or studies regarding e-cigarettes that we should relent from moving forward. I believe the opposite is the case when it comes to a product of this nature. Given the open questions and lack of oversight at a federal or state level, it is incumbent on us to take action until studies show e-cigarettes and similar products are completely safe, not wait to react once they are proven detrimental. Plus, despite a state law banning the sales of e-cigarettes to minors, the new "vaping" industry is targeting youth in the same manner that the tobacco industry has targeted our children for decades. There are unique flavors and youth targeting in marketing e-cigarettes in an unregulated manner since the state and national government has been slow to act in putting forward a policy we can follow.

Despite those arguments, the reality is that in recent years, there have been studies on the effects of e-cigarettes. Those who seek to profit from this rapidly growing industry prefer to refer to the products as vaporizers and retailers refer to themselves as "vape" shops. The choice of words is not by accident. It implies that the substance emitted from e-cigarettes is simply water vapor. In reality, there are numerous toxic substances emitted into the air from e-cigarettes aerosol. At least ten chemicals listed as carcinogens and reproductive toxics pursuant to California's Proposition 65 have been identified in mainstream or secondhand e-cigarette aerosol. It has also been shown that these products

have no measurable effect on smoking cessation and even reduces the likelihood of quitting or increases nicotine intake by now allowing smoking in all environments. The evidence has mounted against e-cigarettes to such a great extent that as of January 2, 2014, 108 municipalities and three states include e-cigarettes as products that are prohibited from use in smoke free environments.

Given the fact we have a robust ordinance regulating the use of tobacco and other smoke emitting products in many environments in our city, such as all indoor public spaces and parks, an amendment to our current ordinance simply adding e-cigarettes and all variations of like products to our current regulations should not require excessive staff time or intense evaluation. The only change I would make to the recommendation by Council Member Herrera is to remove the exception for prescription uses. This would make regulation much more challenging. And, the negative impacts of second hand aerosol does not discriminate depending on whether the smoker has a prescription or not. I would urge this Committee and, ultimately, the entire Council to quickly move to ban the use of electronic smoke products in places where we have thankfully become accustomed to a smoke free environment.



Memorandum

TO: Rules and Open Government
Committee

FROM: Councilmember Rose Herrera

SUBJECT: San Jose E-Cigarette Regulation

DATE: March 27, 2014

APPROVE

Rose Herrera
DB

Recommendation

Direct staff to draft an amendment to city ordinance title 9 section 44 that would regulate non-prescription electronic smoke and vaporizing products in the same way as traditional tobacco products within the City of San Jose.

Background

For decades as a country we have made great strides to curtail tobacco marketing targeted directly to children, slowly replacing ads glorifying cigarettes with ads educating about its dangers. As a state we recognized the danger of second hand smoke for those of all ages and banned tobacco use in many public places, keeping the carcinogens and toxins found in cigarette smoke out of the lungs of those who do not want it there. As a city we continued the positive trend forward and further restricted tobacco use within our jurisdiction.

With the emergence of electronic cigarettes (e-cigarettes) some claim that old tobacco regulations need not apply. E-cigarettes are electronic products often designed to look like actual cigarettes, and are made to deliver chemicals such as nicotine, THC (the active ingredient in Marijuana), or artificial flavors to the lungs using vaporized aerosol. E-cigarettes are marketed on television and radio, sold in kid-appealing flavors, and frequently smoked both indoors and in public places.

While some would argue this is a new product, only slightly correlated to the health risks of traditional tobacco products, or even an aid to quit smoking, the growing medical evidence suggests otherwise. Use of e-cigarettes have been shown to increase addiction to nicotine, leading to higher, not lower, use of traditional tobacco products. The aerosol emitted by those smoking e-cigarettes has not been proven safe to those surrounding the smoker. The nicotine contained in many e-cigarettes, including those that claim to be nicotine free, has been deemed by the Surgeon General to be highly addictive and can contribute to peptic ulcers, cardiovascular disease, reproductive disorders, and many other health problems.

The delivery system is also a danger as the nicotine and THC cartridges are not standardized or regulated, usually containing a more concentrated substance. Because of this an individual may find it hard to know the dosage they have taken. Pharmacologists at UCSF state that just a tablespoon of

nicotine can be lethal to adults if ingested in this concentrated form. Even spilling the liquid on your hands can absorb the chemicals in toxic amounts.

More than the health problems cause by e-cigarettes we must also be weary of the cultural changes widespread use of this product can have. Often indistinguishable from regular smoking devices, children will be exposed to smoking in public places that would normalize the behavior. Normalizing nicotine addiction in any form through the use of e-cigarettes in public or their widespread advertising would create a culture akin to one we deemed unhealthy over fifty years ago. Just because the delivery system is more complex than it was in the fifties does not mean we should regulate this product any less than we have come to regulate traditional cigarettes.

Conclusion

San Jose must stand with the numerous other cities across the country declaring that e-cigarettes are in fact nothing new but should be regulated and held to the exact same standards we hold traditional tobacco products. This will hopefully help spur the state and the federal government to do the same in their own jurisdictions. I request staff look into appropriate language and draft an amendment to City Ordinance Title 9 section 44 that would include non-prescription electronic smoke and vaporizing products to the definition of tobacco products for regulation purposes.